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MONTANA PROSECUTOR

cil/March, 1978 Volume 2, No. 3

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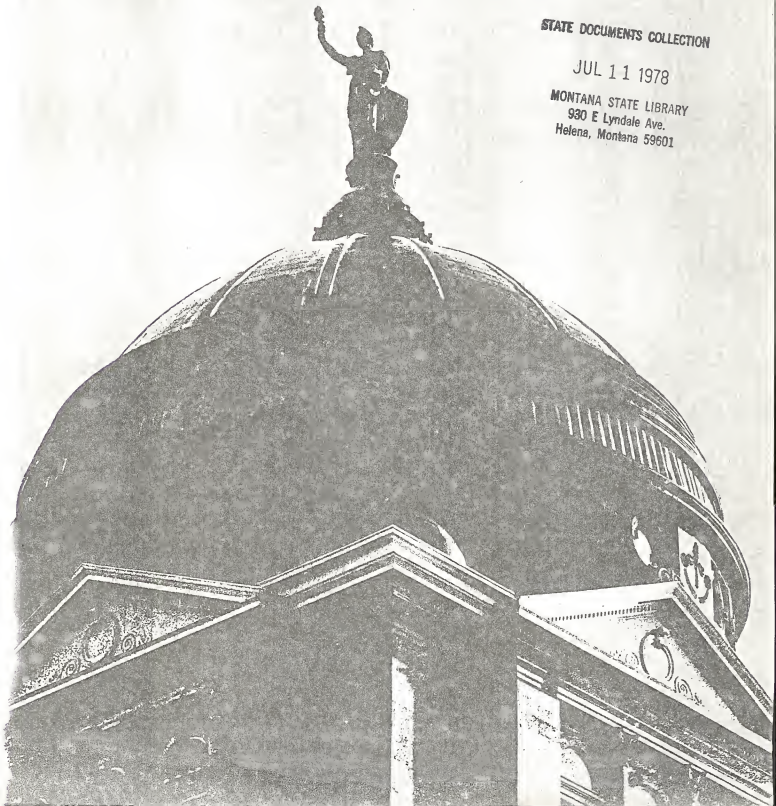


INTRODUCTORY NOTES

At the Narcotics Seminar held in Bozeman on April 6th and 7th, 1978 Jim McCann, President of the County Attorney's Association, appointed a Legislative Committee to begin formulating plans for a legislative package to be presented at the next session. Evon Anderson will chair the committee, which includes J. Fred Bourdeau and Bob Brooks. The office of County Prosecutor Services will assist the committee. Also, at the seminar, Don White reported that the results of the recent survey concerning the possible implementation of a district Attorney system will be available in the near future. Further discussion will be had at the MCAA Summer Conference to be held July 19th through July 22nd, 1978 at Fairmont Hot Springs.

Plans for the Summer Conference are being formulated and further information concerning the agenda and schedule will be forthcoming.

For those county attorneys who did not attend the Narcotics Seminar in Bozeman, the instructional materials used at the conference will be mailed to you in the near future.

Ralph Holman, President of the Montana Outfitters and Guides Association has requested that an announcement be made that the next meeting of that Association will be in Lewistown on May 17th and 18th. Any county attorneys or deputies interested in attending that conference are welcome to do so. Please contact the County Prosecutor Services Bureau if interested.

Included within this issue of the Montana Prosecutor is a sample omnibus pre-trial conference memorandum and order some prosecutors may be interested in attempting to implement within their jurisdictions. Utilization of such a procedure may not only save time but it also may aid in maintaining an accurate record of pre-trial proceedings, in addition to diminishing pre-trial gamesmanship.

The Montana Board of Crime Control has awarded us a second grant for out-of-state prosecutor training. That means that additional funding is available for out-of-state training programs to county attorneys and their deputies. The grant calls for the county from which a person attends to provide ten percent (10%) of the total cost, with ninety percent of the expense being covered by the grant. Address requests for attendance to the County Prosecutor Services Bureau, Attn: Marc Racicot, Attorney General's Office, Helena, Montana 59601

The case of State v. Brackman, on appeal to the Montana Supreme Court from Lewis and Clark County, dealing with consensual electronic surveillance or participant monitoring has been scheduled to be reargued before the Court in May. In the District Court Judge Gordon Bennett suppressed tape recordings of conversations with the defendant, which had been recorded with the consent of the other party to the conversations. The State appealed that decision. The County Attorney's Association has submitted a brief as amicus curiae.

The office of County Prosecutor Services exists to serve Montana prosecutors. If you have suggestions or requests don't hesitate to submit them.

You may purchase the NDAA publication "Confessions and Interrogations After Miranda," 6th edition, for 50 cents per copy plus 50 cents for postage if you order it before May 27, 1978. It is an excellent publication and can be obtained by writing to Jim Manak, NDAA, 211 East Chicago Ave., Suite 1515, Chicago, Ill. 60611.

QUOTE FOR THE PROSECUTOR

"There is danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." Justice Robert H. Jackson, Terminiello v. Chicago.

RECENT CASES AND NOTES

CONTINUANCE

Held proper to refuse a continuance in a murder trial where missing witness' testimony was cumulative on a matter not critical to the defense. State v. Lacquey, 571 P.2d 1027.

HEARSAY

Defendant's admissions are not hearsay under Rule 801(d)(2) and where defendant offered part of a witness' hearsay statement, the state was entitled to offer the rest of it. State v. Powers, 571 P.2d 1016.

PHOTOS

Where the defense tried to stipulate to the cause of death and there was no clear testimony on whether decedent jumped or was pushed into the path of oncoming traffic and that was the only question. The admission of photos of bloody, pus filled wounds was reversible error since it was a close case. State v. Powers, 571 P.2d 1016.

PROBATION CONDITIONS

Imposition of a consent to search probation clause as a condition of probation is proper. State v. Goetell, 572 P.2d 115.

SEARCH AND SEIZURE

The Fourth Amendment barrier to searches is not lowered by the passage of time once it has been raised. Thus an officer could search a pillbox taken from a defendant as a search incident to an arrest, even though the search occurred some time after the arrest, when the officer was in the process of returning the pillbox to the defendant, who had been released and re-arrested for DWI. United states v. Chadwick, 97 S.Ct. 2476 is distinguished as a search of personal property found in proximity to defendant and in his control rather than on his person. State v. Goetell, 572 P.2d 115.

BLOOD TESTS

Colorado Supreme Court holds that Colorado's implied consent law, under which a person has a right to refuse to take a blood test, applies only to misdemeanor cases and not to felony cases. People v. Blandon (Colo.) 568 P.2d 1171

Proper under Georgia's implied consent law to take a blood sample from an unconscious defendant and use the results (.19) in a subsequent vehicular manslaughter prosecution. Smith v. State (Ga.App.) 238 S.E.2d 698.

CIRCUMSTANTIAL EVIDENCE

Hawaii Supreme Court follows Arizona Supreme Court in holding that a circumstantial evidence instruction was properly rejected since a reasonable doubt instruction was given. State v. Bush (Hawaii) 569 P.2d 349.

CONFESSION

Period of delay between time of arrest and appearance before a magistrate is simply one fact that a judge must consider in determining voluntariness of a confession, therefore confession was not rendered inadmissible merely because defendant was not taken before magistrate until 36 hours after arrest, where defendant was interrogated for only two hours after being taken into custody, there was no allegation of coercion, and prior to making a statement, defendant was advised of his rights. United States v. Gibbons, (E.D.Pa.) 437 F.Supp. 650.

FEDERAL RULES OF EVIDENCE

The court talks about the co-conspirator exception to the Hearsay Rule, the quantum of proof required, the test to show independence of co-conspirator's statements, and other prerequisites the Government is required to prove. U.S. v. Dixon, (9th Cir.) 562 F.2d 1138.

JUVENILES

Binding a juvenile (who had no previous criminal record, and who was not amenable to treatment within the juvenile system) over as an adult was proper, where the rape and subsequent beating death of an 80 year old woman was committed in an aggressive, violent, premeditated, and willful manner. Berryhill v. State, (Okla.Cr.) 568 P.2d 1056.

OTHER CRIMES

Where defendant offered no other defense and witness made positive identification based upon her observation of defendant at robbery, plea of not guilty did not place defendant's identity in issue so as to justify admission of evidence of subsequent robbery of same store because general rule is that evidence of distinct and independent offenses is not admissible. Williams v. State (Ala.) 350 So.2d 708.

PROSECUTORS

Prosecutor wearing a concealed weapon during the trial was not grounds for a new trial where there was no evidence that any juror knew of the weapon. Ladd v. State (Alaska) 568 P.2d 960.

SEARCH AND SEIZURE

Where officers had been given reliable information that an airplane was being used for criminal purposes by a specific, identifiable individual, it was proper for owner to arrange for installation of an electronic tracking device, although normally, secret surveillance devices in vehicles should be installed pursuant to court order. United States v. Curtis (9th Cir.) 562 F.2d 1153.

Use of specially trained dogs to sniff out luggage containing marijuana at airport is not unconsitutional because it is reasonable and does not violate defendant's expectation of privacy, and reaction by dogs is permissible method of establishing probable cause to search suspect luggage. People v. Campbell (Ill.) 367 N.E. 2d 949.

SENTENCES

Goals of sentencing would be frustrated if a consecutive sentence was not imposed for an escape conviction. Walton v. State (Alaska) 568 P.2d 981.

ARGUMENT

The prosecutor misstating the law of homicide was cured by the prosecutor and the judge telling the jury to follow the law as given by the court, not the prosecutor's version, and by correct jury instructions. State v. Purcell, 572 P.2d 439.

COMPETENCY

"[W]e have not yet reached the point in our criminal justice system where an attorney's skill or competence is measured by the number of motions he files." State v. Ellis, 572 P.2d 791.

EXPERT WITNESS

The testimony of a psychiatrist was not enough to rebut the presumption of sanity where the psychiatrist testified that the temporary insanity was due to the voluntary consumption of intoxicating drugs or alcohol. State v. Fields, 572 P.2d 453.

GRUESOME PHOTOS

The admission of the least gruesome and most relevant photos selected by the judge from a group of 35 photos was upheld. The photos corroborated and explained testimony, aided the jury in understanding the circumstances of the crime, helped the jury determine the degree of the crime and helped the jury determine whether the defendant was insane at the time of the killing. State v. Purcell, 572 P.2d 439.

SENTENCE

75 years to 125 years on an armed robbery charge was not excessive where the defendant had a record dating from 1955 including four other robbery convictions and had threatened to kill the victim during the last robbery. State v. Ellis, 572 P.2d 791.

SPEEDY TRIAL

A violation of the criminal speedy trial rules is waived by a guilty plea. State v. Ellis, 572 P.2d 791.

ATTEMPT - SOLICITATION

Where defendant contacted a man who had sold him stolen goods, made arrangements for the man to kill the victim and arranged a meeting so the man could gain victim's confidence, all occurring before the proposed hit man went to the police and worked with them, a conviction for attempted murder was proper, instead of a conviction for solicitation. Braham v. State (Alaska) 571 P.2d 631.

BREATHALYZER AMPOULE

Dicta in Utah Supreme Court opinion supports the position that the breathalyzer ampoule need not be preserved. In Interest of Oaks (Utah) 571 P.2d 1364.

DOUBLE JEOPARDY

An acquittal on a sodomy count due to the state's failure to prove penetration did not prevent the use of the same evidence at a trial for lewd and lascivious behavior since the first jury convicted on the lewd and lascivious count, after which a mistrial was declared. Piesik v. State (Alaska) 572 P.2d 94.

ENTRAPMENT

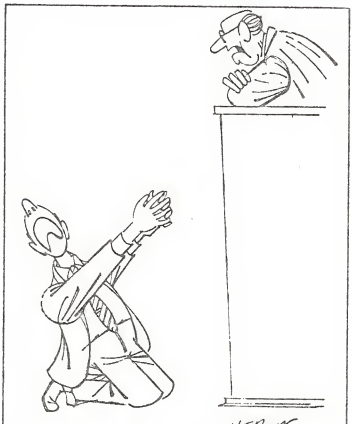
The Hawaii Supreme Court adheres to the rule that entrapment is an affirmative defense in State v. Anderson (Hawaii) 572 P.2d 159.

GUILTY PLEA

Mistaken belief by defendant that she had an agreement with prosecutor about the sentence that he would recommend, in return for her testimony against another, was insufficient to set aside guilty plea, after she was told by the judge that he did not have to follow the recommendation of prosecutor. People v. Bolden (Mich.App.) 259 N.W.2d 389.

SEARCH & SEIZURE

Although officer's action in stepping two or three feet off public sidewalk onto private property in order to look into a lighted basement window was illegal, it was not plain error and therefore, did not require suppression of evidence subsequently seized. A warrantless search of the premises 30-40 minutes after officer saw narcotics was reasonable because of danger that narcotics would be removed or destroyed and there was testimony from a magistrate it would probably have taken two hours minimum to get a search warrant. United States v. Johnson, 561 F.2d 832, Cert. den. 97 S.Ct. 2953.



"I'm afraid you don't understand—when I asked 'how do you plead?', I meant are you guilty or not guilty?"

ARREST

Mere fact that officer used his gun when he accosted defendant does not, by itself, conclusively establish that officer's action constituted arrest, rather than stop and frisk. United States v. Bull (4th Cir.) 565 F.2d 869.

ARSON

An almanac of information on the hot offense of arson, including a conviction on circumstantial evidence. State v. Keeton (Neb.) 259 N.W.2d 277.

CONSPIRACY

Individual defendant's knowledge of the over-all enterprise could properly be inferred from his considerable dealings, since it would be unrealistic to assume that major producers, importers, wholesalers, or retailers of narcotics do not know that their actions are inextricably linked to a large ongoing plan or conspiracy. United State v. Taylor (2nd. Cir.) 562 F.2d 1345.

DEFENSES

Refusing to allow the defense to introduce evidence which would tend to indicate that the state's principal witness had a motive and capacity himself to commit the crime after independent evidence was introduced to connect the witness with the crime was reversible error. State v. Hawkins (Minn.) 260 N.W.2d 150.

DOUBLE JEOPARDY

Prosecutor's improper impeachment of prosecution witnesses through use of prior statement did not make sua sponte grant of mistrial a manifest necessity so as to permit retrial over claim of double jeopardy where defendant had not consented to the mistrial so as to waive claim of double jeopardy. People v. Benton (Mich.) 260 N.W.2d 77.

DRUGS & NARCOTICS

Evidence that neither defendant nor codefendant were regular users of heroin and evidence of resale value sustained determination that the possession was with intent to distribute. United States v. Riggins (5th Cir.) 563 F.2d 1264.

DURESS - FIFTH AMENDMENT

Case contains a good discussion of duress, other crime evidence, the Fifth Amendment privilege, tape recording inmates' jail conversations, waste of time, psycholinguistic "expert" testimony, ultimate issue testimony and untimely motions for new trial. United States v. Hearst (9th Cir.) 563 F.Ed 1331.

GOOD LANGUAGE

"[W]e find his naked assertions of unconstitutionality to be without merit." People v. Sexton (Colo.) 571 P.2d 1098.

HEARSAY RULE

Self-serving statements made by defendant thirty minutes after shooting the victim were not made by defendant while still in an excited state, and were not prompted by a startling occurrence in which he was a participant, so the statements did not fall within the res gestae exception to the hearsay rule, and were therefore inadmissible. State v. Taylor (Minn.) 258 N.W.2d 615.

LESSER INCLUDED OFFENSE

Before a defendant is entitled to a lesser included offense instruction, there must be a proper request, the elements of lesser offense are identical to part of elements of greater offense, there must be evidence to justify conviction for lesser offense, and there must be enough differentiation between the two crimes so that the jury could consistently find defendant innocent of the greater and guilty of the lesser offense and there is mutuality. Possession of heroin is not necessarily an element of aiding and abetting the distribution of heroin, therefore possession of heroin is not a lesser included offense of aiding and abetting the distribution of heroin. United States v. Nelson (8th Cir.) 563 F.2d 928.

JUVENILES - SEARCH & SEIZURE

A parent who has reasonable grounds to believe that his child is engaging in serious criminal conduct, to wit, marijuana use, may take steps to confirm his belief, including searching locked boxes. The same principles that validate a citizen's arrest, even if the citizen enlists the aid of an officer to make the arrest, were applied to validate the officer's search of the locked box, made with the consent of the father. Scott, William K. v. Fare (App.) 142 Cal.Rptr. 61.

JUVENILES

A sixteen year old juvenile who had no previous contact with the juvenile justice system was properly bound over as an adult on two robbery charges where the offenses were serious, were committed against persons rather than property, and written certification and psychological reports were used in making the determination. Matter of R.W.J. (Okla.Cr.) 572 P.2d 297.

PRIVACY

Defendant had no reasonable expectation of privacy in gas station restroom where he was in unlocked room for 40 minutes with female companion, after closing time of gas station, therefore police entry of restroom after listening outside and hearing moan and thud and their inadvertant plain view discovery of narcotics was proper. People v. Hunt (Mich.App.) 259 N.W.2d 147.

PRIOR CONVICTIONS

Defendant may always use prior felony convictions of prosecution witness, regardless of its probative value or relationship to witness's veracity, and need not produce a public record of the conviction to lay foundation for the cross-examination, so it was reversible error for the court to exclude the evidence as prejudicial to the witness and to the state's case. United States v. Nevitt (9th Cir.) 563 F.2d 406.

PROBABLE CAUSE

Discussion in majority and concurring opinion on Aguilar and Spinelli and the two pronged test's effect on an anonymous tip. The majority opinion held the tip which stated that the defendant, with two female companions, would return in five hours with a load of dope to a specified address, in one of two well described cars was adequately corroborated by independent observation, search upheld. People v. Walker (Mich.) 259 N.W.2d 1.

PROSECUTORS

Changing indictment from misdemeanor to felony was proper, despite contention it was in response to defendant's exercise of right to jury trial, where prosecutor could justify the action because he could not prove the misdemeanor case and defendant could not show substantial evidence of vindictiveness. United States v. Ricard (2nd Cir.) 563 F.2d 45.

RULE OF EXCLUSION

Violation of sequestration order by permitting mother of nine year old victim to be seated in courtroom during daughter's testimony was not abuse of discretion because the purpose was to only reassure the daughter and where the brief testimony of the mother neither contradicted nor supported the daughter as it concerned unrelated matters. State v. Gray. (La.) 351 So.2d 448.

SEARCH & SEIZURE

There is no requirement that police inform the defendant that he has a right to refuse consent to search, here the evidence was overwhelming the consent to search was voluntary, so suppressing the fruits of the search because the warning was not given constituted reversible error. People v. Hayhurst (Colo.) 571 P.2d 721.

An untested informant's tip that defendant was smuggling drugs into the jail plus the defendant moving his hand suddenly toward his mouth constituted probable cause allowing officer to place a chokehold on the defendant until he abandoned a balloon of heroin. State v. Wilson (Ore.App.) 571 P.2d 554.

SEARCH & SEIZURE (cont.)

Where defendant gave confederate key to motel room with no intention to have it returned, he gave complete control over premises to confederate and thereby risked confederate giving consent to search room, so where consent was not challenged, search and seizure was valid. United States v. Gulma ((th Cir.) 563 F.2d 386.

STANDING - JURISDICTION

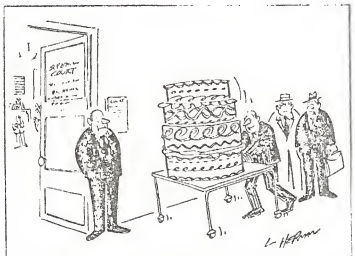
Defendants had no standing to challenge warrantless search of building in which they had been arrested, as they were mere trespassers in the building, even though defendants were members of Indian tribe which owned building and were thus shareholders of the operation of the building. Case also deals with the law school problem where A stands on one side of border and shoots at B on other side of border -- malice follows bullet, even though bullet missed. State v. Winckler (S.Dak.) 260 N.W.2d 357.

SUFFICIENCY OF EVIDENCE

While no witness actually saw the defendant driving, several witnesses saw him in a position consistent with having been the driver immediately after the accident, so the state met its burden of proof and defendant's conviction of vehicular manslaughter was affirmed. State v. Rhoades (Me.) 380 A.2d 1023.

WITNESSES

Arizona rule permitting calling party to impeach its own witness with prior inconsistent statements admitted as substantive proof, while the opposing party may impeach with prior inconsistent statments but cannot produce them substantively is not violative of either due process or equal protection. Skinner v. Cardwell (9th Cir,) 564 F.2d 1381.



"I understand they're calling a surprise witness in the 'Stag Party Murder Case'!"

ARREST - SEARCH & SEIZURE

Fact that defendant was sitting on a park bench next to a person smoking marijuana was insufficient to establish probable cause for defendant's arrest and search, since mere presence in an area where contraband is being consumed, without more, is insufficient to establish joint activity. State v. Hansen, 573 P.2d 896.

COMMENT ON SILENCE

An innocent question "And then what occurred?" followed by the answer "He said that he didn't want" (objection, sustained) did not focus the jury's attention on appellant's exercise of his right to remain silent and was not error. State v. Mann, 573 P.2d 917.

FIFTH AMENDMENT

It was not misconduct for the prosecutor to call a witness that had already been convicted, who then refused to answer questions, because there was no clear evidence that the prosecutor knew the defendant wouldn't answer questions, he agreed to withdraw the witness as soon as the witness refused to answer questions, and any inference that the defendant and the witness were connected was independently corroborated. State v. Caldwell, (Ariz.) 573 P.2d 864.

OTHER CRIMES

Evidence of fresh needle marks in defendant's arm was relevant circumstantial evidence to prove the crime of possession of heroin and does not violate the rule against other crimes evidence. State v. Jovenal, 573 P.2d 515.

SEARCH & SEIZURE

Facts that an airplane carrying contraband met an unidentified pickup and shortly thereafter defendant's pickup was seen driving away from the area at 70-90 m.p.h. without lights on a gravel road in a sparsely populated area at 2:30 A.M. gave rise to a reasonable suspicion the vehicle was being used illegally. The fact that the vehicle ran when the patrol car turned on its lights constituted probable cause to arrest, and a discrepancy in testimony between the arresting officers about a U-turn was not grounds for suppression. State v. Schutte, 573 P.2d 882.

STIPULATIONS - MURDER

A stipulation that the victim was murdered was sufficient to prove that two bullet wounds caused the victim's death. State v. Caldwell (Ariz.) 573 P.2d 864.

VEHICLE - FORFEITURE

Evidence that the vehicle in question had marijuana seeds and debris, and was parked in front of the owner's house where a large quantity of marijuana was transported was sufficient to show that the vehicle had been used to transport marijuana and that the owner was aware of the use, and uphold the forfeiture. The quantity of contraband need not be a usable amount in order to forfeit the vehicle. Matter of 1972 Chevrolet Monte Carlo, Etc. 573 P.2d 535.

ATTORNEYS - DUE PROCESS

Anyone other than a qualfied prosecuting attorney questioning state's witnesses, or cross-examining defense witnesses, violates the defendant's right to due process. Two defendant's traffic violation convictions were reversed where no prosecutor was present and the judge questioned the officer and cross-examined the defendant. People v. Carlucci 143 Cal.Rptr. 578.

CONSENT

Authority to consent to warrantless search derives not from property interest in premises but from actual inhabitation, therefore, landlord may not validly consent to search of house he has rented to another, nor may hotel clerk validly consent to search of customer's room, but where several persons are actual co-inhabitants, any one has a right to permit inspection in his own right, and others have assumed risk that one of their number might permit common area to be searched. State v. Martin (Minn.) 261 N.W.2d 341.

DRUGS & NARCOTICS

Since sale of heroin and sale of cocaine are distinct offenses and require different proof the state may charge both sale of heroin and cocaine even though both drugs were sold at one time in one transaction. Muller v. Sheriff, Clark Cty 572 P.2d 1245.

HABITUAL OFFENDER

Colorado's habitual offender statute is held to be constitutional, and this particular case survives a selective prosecution attack, which contained a report showing that less than one percent of all who could be prosecuted as habitual criminals were prosecuted. The decision to charge depends on the prosecutor's judgment and the report failed to show how many were charged but had the habitual criminal charge dropped as a result of plea bargains, how many prior felonies prosecutors were ignorant of, etc. People v. Larson (Colo.) 572 P.2d 815.

INFORMANTS

Where defendant was in a position to know what took place between himself and officer and informant with regard to drug sale transaction, he, at a minimum, should have informed court in an offer of proof of facts indicative of entrapment which would have suggested possibility that disclosure of informer's identity might indeed have been relevant and helpful to defense, and without such showing, disclosure of informant's identity was not required. Commonwealth v. Herron (Pa.) 380 A.2d 1228.

INSANITY

Although use of expert witness by government to rebut defendant's expert testimony tending to show insanity is usually desirable, it is not always prerequisite to withstand motion for judgment of acquittal, and government's rebuttal evidence here was sufficient to allow jury to find defendant was legally sane beyond a reasonable doubt, despite fact government produced no expert testimony. United States v. Hudson (4th Cir.) 566 F.2d 889.

JUVENILES

Idaho follows the California Supreme Court in holding that if a juvenile does not appeal the order binding him over to be tried as an adult prior to his trial as an adult, then he may not raise the matter on appeal from an adult guilty verdict. State v. Harwood (Idaho) 572 P.2d 1228.

LICENSE REVOCATION

Conduct of defendant in declining to take a breath test on several occasions after being read her implied consent rights, although she later changed her mind and consented to take test, 1 1/2 hours later, initial action amounted to a refusal to take requested consent test and was proper basis upon which to revoke driver's license. Rouse v. State Dept. of Public Safety (S.D.) 261 N.W.2d 418.

SUFFICIENCY OF EVIDENCE

Evidence that the robbers ran to defendant's car, told him to get out of there quick, there was a high speed chase, and the car had stolen plates on it was sufficient to sustain defendant's conviction for conspiracy to commit robbery and robbery on an aid and abet theory. People v. Larson (Colo.) 572 P.2d 815.

CONFESSIONS/SELF-INCRIMINATION - NARCOTICS - INTOXICANTS - DRUGS

The Florida Circuit Court, Eleventh Circuit (Dade County), declares the state's marijuana law unconstitutional as applied to private possession. Although the state supreme court, in Laird v. State, 342 So2d 962, 20 CrL 2527 (1977), refused to reach the same conclusion due to the inadequacy of the record before it, this court was presented with "more than an adequate" record to support its determination that the legislature lacked a rational basis for its decision to ban the private possession of pot.

The state has failed to show that public health, safety or welfare justifies the legislative prohibition of private use and possession on marijuana on one's home, the court says. On the other hand, the defendant has made a strong showing that the classification of marijuana with strictly controlled drugs is irrational. The court also emphasizes that marijuana poses less danger to the user than some substances placed in lower classifications; it is even less harmful than alcohol and tobacco which are not classified at all. Comparing the social effects of prohibition against those of decriminalization, the court concludes that a rational balancing test favors decriminalization. The court also holds that the statute, which provides for up to five years imprisonment, violates the federal and state constitutional prohibitions of cruel and unusual punishment. State v. Leigh, Fla. Cir. Ct. 11th Cir. (Dade County) 1/18/78, 22 CrL 24107.

PLEA BARGAINING ENDS IN BOULDER, CO.

As of January 1, Boulder County, CO did away with plea bargaining in felony cases. Predictably, the effect so far has been an increase in trials and more work for public defenders, judges and other court personnel. The key to District Attorney Alex Hunter's new system is a more realistic charging system so that the original charge will hold up during trial. However, one attorney claims that plea bargaining has merely shifted to the period before the charge is filed. (See New York Times 2/17/78).

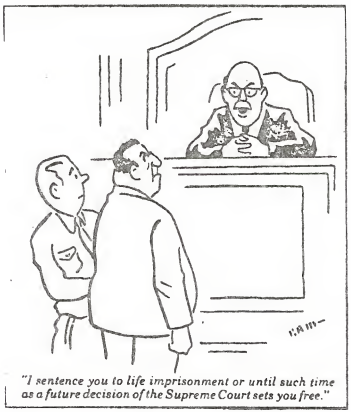
PROSECUTOR - ALIBI

Proper to refuse to allow the defense attorney to call the prosecutor to rehabilitate defendant's alibi witnesses by showing that even if the witnesses had called the prosecutor's office to tell him about defendant's alibi, no follow-up investigation would have been done. The testimony was not vital to the defense and did not establish a new defense theory. Montez v. State, 573 P.2d 34.

DEFENDANT'S RIGHTS/DEFENSES - DEFENSES - INSANITY - CAPACITY

Recent decisions by the U.S. and Georgia Supreme Courts lead the U.S. Court of Appeals for the Fifth Circuit to reverse a district court decision holding that the state must shoulder the burden of proof on a defendant's mental capacity, once some evidence contesting mental capacity has been introduced. 425 F.Supp. 1355, 20 CrL 2519 (USDC MGa. 1977) Rivera v. Delaware, 429 U.S.877, 20 CrL 4030 (1976), Patterson v. New York, 432 U.S. 197, 21 CrL 3146 (1977), and Durham v. State, 239 Ga.697, 238 SE2d 334 (1977), have undercut the basis of the district court's conclusion and required that its grant of habeas corpus to a Georgia murder defendant be reversed.

Rivera and Patterson reaffirmed the validity of Leland v. Oregon, 343 U.S. 790 (1952), which held that a state could require a defendant to prove his insanity beyond a reasonable doubt. The effect of Durham is to undermine the petitioner's argument that, under Georgia law, mental capacity is an element of his offense which the state must prove beyond a reasonable doubt. Durham makes clear that insanity is an affirmative defense, and lack of mental capacity must be treated the same way. Grace v. Hopper, 22 CrL 2418.



"I sentence you to life imprisonment or until such time as a future decision of the Supreme Court sets you free."

PLEA BARGAINING: DUE PROCESS

Bordenkircher v. Hayes, No. 76-1334 (U.S. Sup.Ct., Jan. 18, 1978). The Supreme Court considered in this case the question of whether the due process clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he would not plead guilty to the offense with which he was originally charged. The Court of Appeals for the Sixth Circuit concluded that the prosecutor's conduct during the plea bargaining negotiations in question had violated the principles of Blackledge v. Perry, [417 U.S.21], protecting defendants from the vindictive exercise of a prosecutor's discretion. The Supreme Court reversed that judgment.

The defendant was indicted by a county grand jury in Kentucky of uttering a forged instrument in the amount of $88.30; this was punishable by 2 to 10 years in prison. During plea bargaining negotiations the Commonwealth's attorney offered to recommend a sentence of 5 years if the defendant would plead guilty. He also stated at that time that if the defendant would not plead guilty and "save the court the inconvenience and necessity of a trial," he would attempt to have him indicted under the State Habitual Criminal Act. If convicted under that Act, the defendant would be subject to mandatory life imprisonment because of his two previous felony convictions of which the prosecutor was aware.

When the defendant refused to plead guilty, the prosecutor sought and obtained an indictment under the Habitual Criminal Act. The defendant was found guilty and was sentenced to life imprisonment. Hearing the defendant's petition for federal writ of habeas corpus, the Sixth Circuit Court of Appeals concluded that the prosecutor's conduct during the plea bargaining negotiations had violated the principles of Blackledge v. Perry; the court found that he acted vindictively since he had conceded that the original indictment was influenced by his desire to induce a guilty plea.

The Supreme Court held that the court of appeals was mistaken in ruling that the substance of the plea offer itself violated the Fourteenth Amendment's Due Process Clause. The Court distinguished the present case from Perry in which a prosecutor was prohibited from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy. "The Court has emphasized that the due process violation in cases such as . . . Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right [cites omitted] but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." In the plea bargaining situation, however, the Court said that "there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."

The Court stated that it is a "simple reality""that what the prosecutor is seeking in plea bargaining is to get the defendant to forego his right to plead not guilty. To hold that this objective may not play a part in the prosecutor's charging decision "would contradict the very premises that underlie the concept of plea bargaining itself." Justice Stewart wrote the opinion for the majority. Dissenting were Justices Blackmun, Brennan, Marshall and Powell. See, however, State v. Sather, 34 St.Rptr. 462 (1977).

* * * * * * * * * * * * * * * * *

The Senate Subcommittee on Improvements in Judicial Machinery, a subcommittee of the Judiciary Committee will be holding hearings on Senate Bill 1314 on April 21, 1978. This bill amends Title 28 U.S.C. to provide that state prisoners shall not be denied federal habeas corpus relief on the ground that such prisoners were previously afforded a full and fair opportunity to litigate their claims. Members of the Judiciary Committee, in case you wish to contact them, are:

James O. Eastland - Mississippi	Strom Thurmond - S.C.
Edward M. Kennedy - Mass.	William L. Scott - Va.
John L. McClellan - Ark.	Paul Laxalt - Nev.
Birch Bayh - W. Va.	Orrin F. Hatch - Utah
James Abourezk - S. Dak.	Malcolm Wallop - Wyo.
James B. Allen - Ala.	Paul Hatfield - Mont.
Joseph R. Biden, Jr. - Del.	John Culver - Iowa
Howard M. Metzenboum - Ohio	Dennis DeConcini - Ariz.

IN THE _____DISTRICT COURT OF THE _____JUDICIAL

DISTRICT IN AND FOR THE COUNTY OF _____

* * * * * * * * * * * *

STATE OF MONTANA,	)	
	)	
Plaintiff,	)	CRIMINAL NO. _____
	)	
-vs-	)	DATE HELD _____
	)	
_____,	)	
	)	
Defendant.	)	

* * * * * * * * * * * *

ORDER ON OMNIBUS PRE-TRIAL CONFERENCE

* * * * * * * * * * * *

(INSTRUCTIONS: If an item numbered below is not applicable to this case then counsel will note the same in the margin opposite the item numbered with the letters, "N.A.")

A. DISCOVERY BY DEFENDANT (Circle appropriate response)

1. The defendant states he (has)(has not) obtained full discovery and (has)(has not) inspected the State's file. (If State has refused discovery of certain materials, defendant's counsel shall state nature of such material.)

_____

_____

2. The State affirms that it (has)(has not) disclosed all evidence in its possession, favorable to defendant on the issue of guilt.

3. The defendant requests and moves for: (Circled sub-paragraph shows motion requested)

a. Discovery of all oral, written or recorded statements or memorandum of them made by defendant to investigating officers or to third parties and in the possession of the state.
(Granted) (Denied)

_____
District Judge (Date)

b. Discovery of the names of the State's witnesses and their statements.
(Granted) (Denied)

_____
District Judge (Date)

c. Inspection of all physical or documentary evidence in State's possession.
(Granted) (Denied)

District Judge (Date)

4. Defendant, having had discovery of items 2 and 3a, 3b and 3c, requests and moves for discovery and inspection of all further and additional information coming into the State's possession as to items 2 and 3a, 3b, and 3c between this conference and trial.
(Granted) (Denied)

District Judge (Date)

5. The defendant moves and requests the following information, and the State affirms that: (Circle the appropriate responses)

a. The State (will)(will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent. Defendant stipulates to the following prior convictions, but reserves the right to object (on grounds other than authenticity) to their introduction in evidence at trial:
Date of Conviction_____Offense_____
Date of Conviction_____Offense_____
Date of Conviction_____Offense_____

Defendant

Attorney for Defendant
Date

b. The State (will)(may)(will not) call expert witnesses to testify. The name of each witness, his qualifications, the subject of his testimony, and his reports (have been)(will be) supplied to the defendant.

c. Reports of physical or mental examinations in the control of the State (have been)(will be) supplied to defendant.

d. Reports of scientific tests, experiments or comparisons and other reports of experts in the control of the State, pertaining to this case (have been)(will be) supplied to defendant.

e. Inspection and/or copying of any books, papers, documents, photographs or tangible objects which the State:

1) obtained from or which belong to defendant, or

2) which will be used at the hearing or trial, (have been)(will be) supplied to defendant.

f. Information in the County Attorney's possession concerning a prior conviction of any person the State intends to call as a witness at the hearing or trial (has been) (will be) supplied to defendant.

g. The State (will)(may)(will not) use any prior felony convictions for impeachment of defendant if he testifies.

Date of Conviction_____Offense_____
Date of Conviction_____Offense_____
Date of Conviction_____Offense_____

Defendant stipulates to such prior convictions, but reserves the right to object (on grounds other than authenticity) to their introduction in evidence at trial.

_____
Defendant

_____
Attorney for Defendant

Date_____

6. The State affirms that:

a. There (was)(was not) an informer (or lookout) involved.

b. The informer (will)(will not) be called as a witness at the trial.

c. It (has)(has not) given defendant the name, address and phone number of the informer.

d. It will claim privilege of nondisclosure. The defendant moves for the disclosure of the name of such informer. The hearing on the motion will be set before a District Judge upon notice.

7. The State affirms that there:

a. (has)(has not) been any electronic surveillance of the defendant or his premises;

b. (has)(has not) been any lead obtained by electronic surveillance of defendant's person or premises.

8. Any information the State has, indicating entrapment of defendant, (has been)(will be) supplied to defendant.

B. DISCOVERY BY THE STATE

The following statements are made by the defendant in response to the State's request:

9. Competency, Insanity and Dimished Mental Responsibility.

a. There (is)(is not) any claim of incompetency of defendant to stand trial.

b. Defendant (will)(will not) rely on a defense of insanity at the time of the offense.

c. Defendant (has)(has not) supplied the name of his witnesses, both lay and professional, on the issue.

d. Defendant (has)(has not) permitted the State to inspect and copy all medical reports under his control or the control of his attorney.

e. Defendant (will)(will not) submit to a psychiatric examination by a court-appointed doctor on the issue of his sanity at the time of the alleged offense.

10. Alibi.

a. Defendant (will)(will not) rely on an alibi.

b. Defendant (has)(has not) furnished the State a list of his alibi witnesses (but desires to be present during any interview of such witnesses).

11. Scientific Testing.

a. Defendant (has)(has not) furnished the State the results of scientific tests, experiments or comparisons and the names of the persons who conducted the tests.

b. Defendant (has)(has not) provided the State with all records and memoranda constituting documentary evidence respecting such test in his possession or under his control or (has)(has not) disclosed the whereabouts of said material. If such documentary evidence is not available but destroyed, the defendant (has)(has not) stated the time, place and date of said destruction and the location of reports, if any concerning the destruction.

12. Nature of Defense.

a. Defendant states that his defense includes: (Circle appropriate response)

1) lack of knowledge of contraband
2) alibi
3) diminished mental responsibility
4) entrapment
5) self defense
6) general denial. Defendant (will)(will not) offer evidence after State rests.

b. Defendant (will)(will not) waive husband and wife privilege.
c. Defendant (will)(may)(will not) testify.
d. Defendant (will)(may)(will not) call additional witnesses.
e. Defendant (will)(will not) call character witnesses.
f. Defendant will supply the State names, addresses, and phone numbers of additional witnesses for defendant_____days before trial.

13. Defendant's counsel states that: (circle appropriate response)

a. As of the date indicated below he (does)(does not) know of any problems involving delay in arraignment, the Miranda Rule or illegal search and seizure or arrest, or any other constitutional problem, except as set forth above.

b. He has inspected this form, and (does)(does not) know of any motion or matter that defendant desires to present to the Court, other than those indicated on this form.

c. There (is)(is not)(may be) a probability of a disposition of this case without trial.

d. Defendant (will)(will not) waive a jury and ask for a court trial.

C. MOTIONS REQUIRING SEPARATE HEARING BEFORE DISTRICT JUDGE

14. The defendant moves: (circled subparagraph shows motion requested)

a. To suppress physical evidence in the government's possession on the grounds of: (circle appropriate response)

1) illegal search and seizure

2) illegal arrest

The hearing on such motion to suppress will be set before a District Judge upon notice.

(Defendant will file a formal motion to suppress such evidence accompanied by a memorandum brief within_____ days. The government will file a responsive memorandum brief within_____days after receipt of defendant's brief.)

b. To suppress admissions or confessions made by defendants on grounds of: (circle appropriate subparagraph)

1) delay in arraignment
2) coercion or unlawful inducement
3) violation of the Miranda Rule
4) unlawful arrest
5) improper use of lineup (Wade, Gilbert, Stovall decisions)
6) improper use of photographs

The hearing on such motion to suppress is set for:
1) date of trial, or
2) upon notice.

c. All material uncovered during the course of surveillance (will)(will not) be supplied to defendant. The defendant (moves)(does not move) for the production of such material. The hearing on the motion will be set before a District Judge upon notice.

(MOTIONS MADE IN THE COURSE OF THIS OMNIBUS PRE-TRIAL CONFERENCE SHALL BE ACCEPTED AS HAVING BEEN TIMELY MADE)

15. The defendant moves: (circled paragraph indicates motion)

a. To dismiss for failure of the information to state an offense.
(Granted) (Denied)
_____
District Judge (Date)

b. To dismisss the information (or count_____ thereof) on the ground of duplicity.
(Granted) (Denied)
_____
District Judge (Date)

c. To sever case of defendant_____and for a separate trial.
(Granted) (Denied)
_____
District Judge (Date)

d. To sever count_____of the information and for a separate trial thereon.
(Granted) (Denied)
_____
District Judge (Date)

e. To take a deposition of witness_____ for testimonial purposes and not for discovery.
(Granted) (Denied)
_____
District Judge (Date)

f. To require State to secure the appearance of witness_____who is subject to government direction at the trial or hearing.
(Granted) (Denied)
_____
District Judge (Date)

g. To dismiss for delay in prosecution.
(Granted) (Denied)

District Judge (Date)

h. To inquire into the reasonableness of bail.
Amount fixed._____
(Affirmed) (Modified to_____)

District Judge (Date)

i. To continue the trial of the case.
(Granted) (Denied)

District Judge (Date)

j. To change the venue of the trial.
(Granted) (Denied)

District Judge (Date)

16. The State moves that the defendant: (Circle appropriate paragraph)

a. appear in a lineup.
(Granted) (Denied)

District Judge (Date)

b. speak for voice identification by witness.
(Granted) (Denied)

District Judge (Date)

c. be fingerprinted.
(Granted) (Denied)

District Judge (Date)

d. pose for photographs (not involving a reenactment of the crime).
(Granted) (Denied)

District Judge (Date)

e. try on articles of clothing
(Granted) (Denied)

District Judge (Date)

f. surrender clothing or shoes for experimental comparison.
(Granted) (Denied)

District Judge (Date)

g. permit the taking of specimens of material under fingernails.
(Granted) (Denied)

District Judge (Date)

h. permit the taking of samples of blood, hair and other materials of his body which involves no unreasonable intrusion.
(Granted) (Denied)
_____
District Judge (Date)

i. provide samples of his handwriting.
(Granted) (Denied)
_____
District Judge (Date)

j. submit to a physical external inspection of his body.
(Granted) (Denied)
_____
District Judge (Date)

D. STIPULATIONS

Stipulations shall be executed by defendant, his counsel and the State's counsel and shall be attached hereto and filed at the omnibus hearing. Witness lists will be exchanged prior to trial.

E. Trial Date and Time: _____
Trial Place: _____

F. Trial by (Court)(Jury) Ordered.

G. Estimated trial time: _____

H. _____
_____
_____

APPROVED:

_____
County Attorney

_____
Attorney for Defendant

_____
Defendant

SO ORDERED:

_____
District Judge
Date _____

APPENDIX A

Honorable_____
Judge, District Court
_____Judicial District
_____, Montana

RE:_____Case No._____

( ) I have discussed the Omnibus Hearing Procedure with my client and wish to inform the Court that we do desire to participate.

( ) I have discussed the Omnibus Hearing Procedure with my client and wish to inform the Court that we do not desire to participate.

_____
Defendant

_____
Attorney for Defendant

Date:_____

cc: County Attorney
Clerk, _____Judicial District